

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX – “PROFESSIONAL SERVICES” EXCEPTION -- NOT PROVEN TO BE APPLICABLE TO SERVICES OF HOME INSPECTOR -- The “professional services” exception from services in general that are subject to the consumers’ sales and service tax, see W. Va. Code §§ 11-15-8 [1955] and 11-15-2(s) [1994, 1998, 2001], does not apply to the services of a home inspector, where such an inspector fails to prove that his or her services comport with the mandatory four-part test of the legislative regulation set forth in 110 C.S.R. 15, § 8.1.1.1 (effective on and after May 1, 1992), and in fact fails to show that home inspection services satisfy any of the four requirements; this legislatively reviewed and approved regulation, following the holding in Wooddell v. Dailey, 160 W. Va. 65, 230 S.E.2d 466 (1976), establishes the criteria that the State Tax Commissioner -- unlike the Legislature -- must use in determining, on a case-by-case basis, whether a service, like the one here, that is not explicitly stated in this legislative regulation to be “professional,” for purpose of the statutory exception from the tax, is, nonetheless, to be considered as “professional” for that purpose, but without resulting in “the exception swallowing the rule” that sales or services are subject to the tax unless the contrary is clearly established, W. Va. Code § 11-15-6 [1987].

CONSUMERS' SALES AND SERVICE TAX -- “GOING FORWARD” TREATMENT -- A taxpayer usually is not entitled to “going forward” treatment when, as here, a published administrative precedent on point predates the state tax assessment.

CONSUMERS' SALES AND SERVICE TAX -- VENDOR NOT ENTITLED TO REFUND -- No refund is due -- to purchasers, much less to the vendor -- for consumers’ sales and service tax collected properly from certain purchasers with respect to nonprofessional services.

FINAL DECISION

A Tax Examiner with the Field Auditing Division of the West Virginia State Tax Commissioner’s Office conducted an audit of the books and records of the Petitioner.

Thereafter, on May 21, 2003, the Director of this Division of the Commissioner’s Office issued a consumers’ sales and service tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the Commissioner, under the

provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. This assessment was for the period of January 1, 1998 through March 31, 2003, for tax, interest, through May 31, 2003, and no additions to tax, for a total assessed liability.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked July 11, 2003, the Petitioner timely filed with this tribunal a petition for reassessment and a petition for refund. See W. Va. Code § 11-10A-8(1) & -8(2) [2002].

FINDINGS OF FACT

The material facts are not disputed. They may be stated as follows.

1. The Petitioner is a West Virginia corporation (an “S” corporation) engaged exclusively in the business of furnishing so-called “home inspection” services, including inspection of commercial buildings as well as private residences. Home inspection services involve, among other things, the detailed examination of homes or commercial buildings and the subsequent submission of important written reports pertaining to the structural condition of the homes or commercial buildings, including major items and systems like foundations, plumbing, heating and cooling, roofing, windows, etc. Home inspection reports are very valuable to potential home (or commercial building) buyers and to lending institutions financing the purchase of homes (or commercial buildings).

2. The Petitioner’s owner, president, and sole employee, a West Virginia, resident who has a bachelor of science degree in accounting from an out-of-state college.

3. At all relevant times Petitioner's sole employee was a voluntary member in good standing of the American Society of Home Inspectors ("ASHI"), a not-for-profit organization established in the year 1976 and whose objectives include the promotion of excellence in the provision of home inspection services. ASHI members must meet rigorous technical and experience requirements. For example, voluntary members of ASHI must pass a difficult two-part written examination and must document that they have conducted at least 250 fee-paid home inspections in accordance with ASHI's published standards of practice and code of ethics. To remain a voluntary member in good standing, ASHI requires a minimum of 20 hours of continuing education each year, including passing a written examination in conjunction therewith.

4. At all relevant times Petitioner's sole employee was also a voluntary member of the West Virginia Association of Home Inspectors, which has membership requirements virtually identical to ASHI's.

5. Although W. Va. Code § 29-3-5b(c) [2001] authorizes the West Virginia State Fire Commission to propose rules for legislative approval establishing state standards for, among other things, the licensing, regulation, and continuing education of, among others, home inspectors, these rules, according to the record in this matter, have not yet been finalized, submitted for approval, or approved by the Legislature.

6. At all times relevant to this matter there were no West Virginia state statutes or duly promulgated and approved legislative regulations providing (1) licensing requirements, (2) minimum education requirements, (3) continuing

education requirements, or (4) nationally recognized standards of performance, all of which were required by law to be followed by all persons who wish to engage or to continue in this State in the business of furnishing home inspection services, as opposed to voluntary membership requirements applying only to those persons, like the Petitioner's sole employee, who very commendably elect to comply with the rigorous membership requirements of ASHI or comparable organizations.

7. On September 21, 1998, the State Tax Commissioner, by an administrative law judge with the then Office of Hearings and Appeals, issued a published administrative decision in Docket No. 96-098 CS holding that home inspection services were not proven to be "professional services" for purposes of the statutory exception from the consumers' sales and service tax for such services. That administrative precedent was not challenged in the courts.¹

8. Upon starting business the Petitioner's sole employee very conscientiously sought advice from an independent certified public accountant with respect to whether the Petitioner's home inspection services were subject to the West Virginia consumers' sales and service tax. That certified public accountant was not sure, so he (curiously) recommended that the Petitioner not collect the tax. Shortly thereafter the Petitioner asked the advice of a West Virginia "regional" office of the State Tax Commissioner with respect to this question, and, again, got no definite answers. Based upon these facts and upon the fact that other home inspectors were not collecting sales tax in the contiguous states, the Petitioner decided initially not to collect the tax.

9. Later, during the year 2000, the Petitioner received information from another certified public accountant that another home inspector had started collecting the tax as required by the State Tax Commissioner. Accordingly, the Petitioner started collecting the West Virginia consumers' sales and service tax from customers and started filing consumers' sales and service tax returns and remitting the collected tax for the monthly period beginning January 01, 2001. The Petitioner continued to collect and to remit the tax and to file returns for the remainder of the assessment period, that is, through March, 2003.

FIRST ISSUE OF LAW -- "PROFESSIONAL SERVICES" EXCEPTION

Discussion

The Petitioner's very capable lawyer has raised a few important issues of law in this matter.

The primary issue is whether the Petitioner has shouldered its burden of proving that its home inspection services are excepted from the consumers' sales and service tax as "professional services."

The West Virginia consumers' sales and service tax applies not only to most sales of tangible personal property but also to the furnishing of most services. W. Va. Code § 11-15-8 [1955]. "To prevent evasion, it shall be presumed that all sales and services are subject to the tax until the contrary is clearly established." W. Va. Code § 11-15-6 [1987]. Similarly, tax exemptions or exceptions are construed

¹ This administrative precedent under the prior system of West Virginia state tax administrative litigation is not binding upon this tribunal, the new, independent, West Virginia Office of Tax Appeals, but, for the reasons discussed below, this tribunal agrees with that holding.

strictly against the person claiming the exemption or exception. Wooddell v. Dailey, 160 W. Va. 65, 68, 230 S.E.2d 466, 469 (1976).

Statutory “exceptions” from the consumers’ sales and service tax are provided for certain types of services, such as for “professional services.” See W. Va. Code §§ 11-15-8 [1955] and 11-15-2(s) [1994, 1998, 2001].² The term “professional services” is not defined in the consumers’ sales and service tax statutes. In syllabus point 1 of Wooddell v. Dailey, 160 W. Va. 65, 230 S.E.2d 466 (1976), the Supreme Court of Appeals of West Virginia held as follows:

The professional services which are excepted from the payment of the Consumers Sales and Service Tax, *W. Va. Code*, 11-15-1, *et seq.*, are not limited to services performed in the practice of law, theology or medicine or in pursuit of occupations specifically recognized as professions by *W. Va. Code*, Chapter 30, but any other profession must be clearly established as a profession by the one who asserts that services rendered in connection therewith are professional services excepted from taxation.

Consistent with this case-by-case -- but not completely unbridled -- approach of Wooddell, the Legislature, by duly promulgated consumers’ sales and service tax/use tax legislative regulations having the force and effect of law, has set forth a definition of “professional services” that (1) explicitly recognizes certain occupations as “professional,” for purpose of the exception from the consumers’ sales and service tax, and (2) provides a mandatory four-part test for the State Tax Commissioner’s Office to utilize in determining, on a case-by-case basis, whether an occupation not explicitly recognized by the Legislature as “professional” for purpose

² A corresponding “professional services” exemption exists for the purchasers’ use tax. See W. Va. Code § 11-15A-3(a)(4) [1987, 2003].

of the consumers' sales and service tax exception may, for that same purpose, be considered as "professional" in nature.

First, in section 2.65 of the consumers' sales and service tax/use tax regulations, 110 C.S.R. 15, § 2.65 (May 1, 1992), the Legislature provides this general definition of the term "professional services": "an activity recognized as professional under common law, its natural and logical derivatives, an activity determined by the State Tax Division to be professional, and any activity determined by the West Virginia Legislature in W. Va. Code 11-15-1 *et seq.* to be professional. See Section 8.1.1 of these regulations."

Then, in section 8.1.1.1 of these regulations, the Legislature provides more specific guidance:

Professional services, as defined [generally] in Section 2 of these regulations, are rendered by physicians, dentists, lawyers, certified public accountants, [registered] public accountants, optometrists, architects, engineers, registered professional nurses, veterinarians, physical therapists, ophthalmologists, chiropractors, podiatrists, embalmers, osteopathic physicians, and surgeons, registered sanitarians, pharmacists, psychiatrists, psychoanalysts, psychologists, landscape architects, registered professional court reporters, licensed social workers, enrolled agents, professional foresters, licensed real estate appraisers and certified real estate appraisers licensed in accordance with W. Va. Code § 37-14-1 *et seq.*, nursing home administrators, licensed professional counselors and licensed real estate brokers. Persons who provide services classified as nonprofessional for consumer sales and service tax purposes include interior decorators, private detectives/investigators, security guards, bookkeepers, foresters, truck driving schools, hearing aid dealers/fitters, contractors, electricians, musicians, and hospital administrators; the foregoing listing is not all-inclusive but intended as containing examples of trades and occupations. The determination as to whether other activities are 'professional' in nature will be determined by the State Tax Division on a case-by-case basis unless the Legislature amends W. Va. Code § 11-15-1 *et seq.* to provide that a specified activity is 'professional.' When making a determination as to whether other activities fall within the 'professional' classification, the [State] Tax D[ivision] will consider such things as [(1)] the level of education required for the activity, [(2)] the nature and

extent of nationally recognized standards for performance, [(3)] licensing requirements on the State and national level, and [(4)] the extent of continuing education requirements.

(underlining emphasis added)

In addition to this substantive law, a relevant procedural law is that the burden of proof is upon a petitioner-taxpayer to show that a state tax assessment is incorrect and contrary to the law, in whole or in part, or to show entitlement to a state tax refund. See W. Va. Code § 11-10A-10(e) [2002]; 121 C.S.R. 1, § 63.1 (Apr. 20, 2003) (Rules of Practice and Procedure before the West Virginia Office of Tax Appeals).

CONCLUSIONS OF LAW -- “PROFESSIONAL SERVICES” EXCEPTION

In light of the foregoing discussion of this issue it is **HELD** that:

1. The Petitioner has failed to show, with respect to home inspection services, any of the following four requirements set forth in the legislative regulation, 110 C.S.R. 15, § 8.1.1.1 (May 1, 1992): (1) that there are minimum education requirements imposed by law; (2) that there are continuing education requirements imposed by law; (3) that there are nationally recognized standards of performance for home inspection services which every person engaged in that occupation are required to follow; and (4) that a specific license is required by law in order to engage in the business of rendering home inspection services.

2. The “professional services” exception from services in general subject to the consumers’ sales and service tax, see W. Va. Code §§ 11-15-8 [1955] and 11-

15-2(s) [1994, 1998, 2001], does not apply to the services of a home inspector, where, as here, such an inspector fails to prove that his or her services comport with the mandatory four-part test of the legislative regulation set forth in 110 C.S.R. 15, § 8.1.1.1 (effective on or after May 1, 1992), and in fact fails to prove that home inspection services satisfy any of the four requirements; this legislatively reviewed and approved regulation, following the holding in Wooddell v. Dailey, 160 W. Va. 65, 230 S.E.2d 466 (1976), establishes the criteria that the State Tax Commissioner -- unlike the Legislature -- must use in determining, on a case-by-case basis, whether a service, like the one here, that is not explicitly stated in this legislative regulation to be “professional,” for purpose of the statutory exception from the tax, is, nonetheless, to be considered as “professional” for that purpose, but without resulting in “the exception swallowing the rule” that sales or services are subject to the tax unless the contrary is clearly established, W. Va. Code § 11-15-6 [1987].³

This holding is not intended to denigrate to any degree the quality of the Petitioner’s home inspection services or the extent of the Petitioner’s technical expertise or skills in this area. To the contrary, on the evidentiary record in this matter the quality of the Petitioner’s home inspection services and the level of

³In Widemann & Associates, Inc. v. Paige, Civil Action No. 93-C-5726 (Kanawha County, W. Va., Cir. Ct. June 27, 1995) (involving private investigators), then Circuit Court Judge A. Andrew MacQueen, III, expressed concern with what he believed was too little legislative guidance as to the scope of the term “professional services,” for purpose of the consumers’ sales and service tax/purchasers’ use tax exception. Therefore, he ruled that the exception was available only to those services explicitly listed as “professional” in the legislative regulation, 110 C.S.R. 15, § 8.1.1.1 (May 1, 1992). While the State Tax Commissioner did not acquiesce to this ruling by one circuit court judge (now retired) in a multi-judge circuit court, and while this tribunal respectfully does not believe that the West Virginia Supreme Court of Appeals would agree with this very restrictive approach to the “professional services” exception, the services of a home inspector are not explicitly listed as “professional” in that regulation; accordingly, under Judge MacQueen’s more restrictive approach, the Petitioner’s argument that its services are “professional” for purpose of this tax exception are totally devoid of merit.

expertise are unquestionably of the highest caliber. However, as stated in section 8.1.1.4 of the regulations:

[“]Professional services[“] shall not be related to the quality of performance or expertise of the person performing the service. [“]Professional,[“] when used in these regulations, is not synonymous with [“]excellence.[“] It is the type of service which must be professional, not the quality [of] or manner in which the service is performed.

SECOND ISSUE OF LAW -- “GOING FORWARD” TREATMENT

Discussion

The second issue of law is whether the State Tax Commissioner’s refusal to place the Petitioner on a “going forward” basis results in a denial of equal protection as applied to the facts in this matter, in light of the fact that the Commissioner recently placed most mortgage brokers on a “going forward” basis with respect to application of the consumers’ sales and service tax to their services.

As a “fallback” argument, the Petitioner contends that, if its home inspection services are not covered by the “professional services” exception from the consumers’ sales and service tax, equal protection principles require that the tax be applied on a prospective basis only, that is, as of a certain date in the future, to be consistent with the Commissioner’s recent treatment of the services of mortgage brokers.

However, no administrative precedents on point had been issued at the time the assessments were issued against the various mortgage brokers. Here, in contrast, the published September, 1998 administrative decision holding home

inspection services to be nonprofessional services had been issued more than two years prior to the time that the Petitioner started collecting the tax. Accordingly, mortgage brokers and home inspectors were not similarly situated and were, instead, in materially distinguishable occupational “classes” for purposes of “going forward” treatment and equal protection analysis. Therefore, the Petitioner’s argument -- that denying it the same “going forward” treatment which was afforded to mortgage brokers results in the “professional services” statute being applied against the Petitioner in a manner that denies equal protection -- is not sound.

CONCLUSION OF LAW -- “GOING FORWARD” TREATMENT

In light of the foregoing discussion on this issue it is **HELD** that a taxpayer usually is not entitled to “going forward” treatment when, as here, a published administrative precedent on point predates the state tax assessment.

THIRD ISSUE OF LAW -- VENDOR’S ENTITLEMENT TO REFUND

Discussion

The third issue of law is whether the Petitioner is entitled to the “refund” it requested (by petition for refund filed with this tribunal, without properly filing a claim for refund first with the Commissioner, see W. Va. Code § 11-10-14(c)-(d) [1996, 2002, 2003]) for the period of January 01, 2001 through March 31, 2003, during which time period the Petitioner did collect the consumers’ sales and service tax from its customers and remit the same to the State Tax Commissioner.

Having held above that home inspection services are not excepted from the consumers' sales and service tax as "professional services" for the periods involved in this matter, this tribunal also holds that the requested refund must be denied.⁴

CONCLUSION OF LAW -- VENDOR'S ENTITLEMENT TO REFUND

In light of the foregoing discussion on this issue it is **HELD** that no refund is due -- to purchasers, much less to the vendor -- for consumers' sales and service tax collected properly from certain purchasers with respect to nonprofessional services.

GENERAL ANALYSIS PRINCIPLES

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just "lip service" to two general points: (1) rather than utilizing a purely "*de novo*" scope of review, due deference is to be given by all reviewing tribunals to the expertise of the administrative agency, in this case, the State Tax Commissioner, even with respect to an "issue of law," when that issue of law is one within the expertise of the administrative agency, see *Appalachian Power Co. v. State Tax Department*, 195 W. Va. 573, 582, 466 S.E.2d

⁴ In any event the Petitioner, as the vendor who is not "out of pocket" for the tax but, instead, who collected the tax for a certain period of time, would not have standing to claim a "refund," unless the purchasers who remitted the tax made valid assignments, for consideration paid, of their claims to the Petitioner. That has not been alleged or proved. Stated another way, without such assignments of the tax refund claims, the Petitioner, as a vendor, holds the collected consumers' sales and service tax in trust for the State Tax Commissioner, not in trust for the purchasers, and must remit all of the tax collected. See W. Va. Code § 11-15-5 [1987]. Each purchaser would be the proper party to raise the issue of whether the consumers' sales and service tax collected from the purchaser and remitted by the vendor to the State Tax Commissioner should be refunded to the purchaser because, for example, the vendor's services were allegedly excepted from the tax as professional services.

424, 433 (1995); and (2) any applicable legislative regulation does not merely reflect the administrative agency's position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, see *Feathers v. West Virginia Board of Medicine*, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing] court [including this tribunal] is whether the agency's answer is based on a permissible construction of the statute.” Syllabus point 4, in part, *Appalachian Power Co. v. State Tax Department*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner need not write a rule that serves the statute in the best or most logical manner; he [or she] need only write a rule that flows rationally from the statute.” *Id.*, 195 W. Va. at 588, 466 S.E.2d at 439 (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary.” *Appalachian Power*, 195 W. Va. at 589, 466 S.E.2d at 440 (*quoting Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

DISPOSITION

Based upon all of the above, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax **ASSESSMENT** issued against the Petitioner for the period of January 01, 1998 through March 31, 2003, for tax, interest, updated through March 31, 2004, and no additions to tax, is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for **REFUND** of consumers' sales and service tax collected from customers, for the period of January 01, 2001 through March 31, 2003, is hereby **DENIED**.